No. 12,746

IN THE

United States Court of Appeals

For the Ninth Circuit

THEODORE W. COBB,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S REPLY BRIEF.

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STATEMENT OF THE CASE.

Briefly, for the purpose of this appeal, the facts may be stated as follows:

Appellant was injured on the Island of Okinawa, which is one of the Japanese mandated islands in the South Pacific known as the Ryukyu Archipelago, when the vehicle in which he was riding as a guest, collided with a crane left on a road by persons unknown but which had a mark on it of "U.S.M.G., or U. S. Military Government". Appellant was invited to ride in the vehicle to a village which was off limits. The vehicle in which he was riding was owned by the United States Government.

Okinawa had been secured and occupied by American troops during World War II and was still under occupation although, we believe, under the International Trustee System of the United Nations by an agreement concluded between the United States and the Security Council of the United Nations on July 18, 1947. Under this agreement the United States acted as an administering authority only. The disposition of this island has not yet been decided.

The trial Court held that Okinawa is a foreign country within the purview of the Federal Tort Claims Act and terminated the action in favor of the Government.

APPELLANT'S POINTS ON APPEAL.

The principal point, and perhaps the only point raised by the appeal, is the question of whether or not Okinawa was a foreign country within the purview of the Federal Tort Claims Act, which excluded from its operation "any claims arising in a foreign country".

The second point, which may be *obiter dictum,* is that assuming the crane was left negligently on the road, is there sufficient proof, under the Federal Tort Claims Act, to hold the United States liable, where the only evidence is that the crane was marked "U.S.M.G., or U. S. Military Government"? Thirdly, if so, is the case within the so-called "California Guest Law"?

WAS OKINAWA A FOREIGN COUNTRY?

The learned opinion of the trial Court seems to answer this question fully and it apparently was not answered by the appellant except incidentally, as hereinafter pointed out. We do not desire to repeat the opinion of the trial Court and hence will confine our brief to matters which do not appear therein.

(1) This precise question has been decided in other cases, which are cited in the opinion of the trial Court. These cases are apparently nearer in point to the question involved, than the following cases:

Dunn v. United States, D.C. N.D. Cal., ... Fed. Supp. .....;

Fleming v. Hager, 50 U.S. 603,

and

De Lima v. Bidwell, 182 U.S. 182.

All the cases cited by the Court and by us, except the last two, arose in Japan, Okinawa, Saipan and Belgium, and were claims under the Federal Tort Claims Act.

(2) The burden of proof is upon the appellant to prove (a) that Okinawa is not a foreign country, (b) the law of the place where the accident occurred.

(3) It is a matter of common knowledge that it is a foreign country, of which the Court may take judicial notice. (See British Encyclopedia and American Encyclopedia.)

(4) The Secretary of State of the United States has administratively determined it is not a part or

possession of the United States. (See Exhibit C.) This exhibit in part, states as follows:

> "Okinawa is an island * * * over which Japan has been acknowledged internationally to be the sovereign * * *. No formal disposition of Okinawa has been reached concerning the final disposition of Okinawa * * *. It is the view of the Department of State that it is not a territory or possession of the United States."

(5) Okinawa has not yet been placed, formally, under the International Trusteeship System of the United Nations but the United States acts only as administrator and administrating authority for the trustee territory. (See Exhibit C.)

(6) The letter of General Allen (Appellant's Exhibit 5), states:

> "The Island of Okinawa * * * is occupied enemy territory and under military government. * * * No treaty concerning any future status has yet been signed."

Hence, from the appellant's own testimony, it is not United States territory nor governed by any laws of the United States.

(7) Only Congress can add territory to the United States, but Congress has not added Okinawa.

(8) The law applicable to Tort Claims is the *lex loci delicti*. Inasmuch as the appellant lays particular stress upon the point that the law of California governs this action, we will answer this more fully under the heading of "Law Applicable".

(9) Appellant bases the jurisdiction of the Court on the evidence that Okinawa was militarily occupied. This obviously does not make it a part of the United States, otherwise the west part of Germany, Italy, Belgium, Japan and the Philippines, among others, would also be a part, or political subdivision, of the United States or its territories. A similar case on this point is

Straneri v. United States, 77 Fed. Supp. 241, cited in the Court's opinion. This was a suit brought under this Act due to alleged negligence of the United States in Belgium. Straneri claimed the Court had jurisdiction because of our military occupation. The Court held it had no jurisdiction even if Belgium was militarily occupied. The same holding was made in

Burnell v. United States, 77 Fed. Supp. 68, and

Dunn v. United States, heretofore cited.

(10) Appellant cites no authority or law which deprives the Japanese of Okinawa and adds it to the United States. He claims it is not foreign territory because of *General MacArthur's order* taking military control and that the island is militarily occupied. He admits that the provost marshal of the armed forces makes the regulations for the operation of the civilian population of the island. The military government consists merely of officers of the armed forces who take over the temporary government of the territory which has been seized by the armed forces, for the purpose of relieving the Army of controlling the civilian population. They are only agents of the mili-

tary forces. The provost marshal is merely concerned with enforcing among the troops the regulations laid down by the commanding general for his troops. We may add that in addition appellant states there are military planes and a military air base on the island. We also have military planes and a military air base in England, however we believe that England would object to this Court finding that England is a part of the United States.

(11) The Court in *Celine Smith, et al. v. United States,* No. 28865, succinctly stated the law in its opinion as follows:

> "Saipan, one of the former Japanese mandated islands in the South Pacific Ocean, has been placed under the International Trusteeship of the United Nations. The Trusteeship became effective under an agreement dated July 18, 1947, between the United States and the Security Council of the United Nations. By its terms, the United States acts as administering authority of the Trustee territory.
>
> The conclusion is unescapable that Saipan is, and was, at the time the injury alleged occurred, a 'foreign country' within the meaning of 28 U.S.C. 943k. Obviously Saipan is not and never has been a component part or political subdivision of the United States or one of its possessions * * *".

Saipan is in the same position as Okinawa as far as this case is concerned.

LAW APPLICABLE.

Apparently the only part of the trial Court's opinion which the appellant takes exception to, in its brief, is where the Court stated that such law as existed in Okinawa, is Japanese enacted law, and no Japanese law was pleaded or proven. Appellant answers this statement by saying the accident had occurred in an area which was *legally void* and that it was under the sovereignty of the United States. (Appellant's Brief, p. 19.) Appellant's answer begs the question. He proves it by a statement which he has to prove. Assuming, for the purpose of argument, there is no law, then he has no cause of action, for the Tort Claims Act is governed by "the law of the place where the act or omission occurred". There is no evidence that Okinawa is under the sovereignty of the United States. In fact the evidence is just the contrary. It was under the temporary control of the United States Army. (We think it has now been placed under the control of the United States Navy.) Congress, as the legislative body of the United States, has not enacted any laws for Okinawa. The Commanding General of the Army, or the Commanding Officer of the Navy, merely makes such regulations as he desires for the safety or control of the Army or Navy and which may be applicable to the civilian population of Okinawa insofar as the Army or Navy is concerned. There is no evidence that the Japanese laws were abrogated, nor is there anything in the record to disclose this. It would seem to be a presumption that, until the contrary appears, that the Japanese law was

still governing. We agree with the appellant, that if the Japanese law has been abrogated, then Okinawa has no law.

Saipan is similarly situated as far as this case is concerned, as Okinawa, yet Congress showed it never intended this Act to apply to these islands when it recently passed Private Law No. 396, 81st Congress, 2nd Session, approved March 16, 1950, compensating a Mr. Finley for personal injuries caused by the negligent operation of a Government vehicle on Saipan. Obviously Congress would not have done so if the claim was within the purview of this Act. On the contrary, both the House and Senate Committees in reporting on this Private Law, held that private relief was necessary.

In the footnote of the case of

U. S. v. Spelar, 338 U.S. 217,

the Court states:

> "Local laws must be pleaded since the Federal Tort Claims Act permits suits only 'where the United States, if a private person, would be liable * * * in accord with the law of the place where the act or omission occurred'."

The Supreme Court in that case further said:

> "* * * Congress was unwilling to subject the United States to liabilities depending upon the law of a foreign power * * *."

On May 17, 1950, the United States Department of Defense announced a plan had been drawn by which Ryukyu Islands, held by the United States under

the Provisional Trusteeship of the United States was to be returned to Japanese sovereignty. The Court perhaps can take judicial notice of this and also perhaps that this plan has been changed.

It is the view of the trial Court that this phase of the case is not the controlling point, as the trial Court pointed out in its decision, although it stated that it was inclined to the view that the Japanese law covered the law of the place. However it is a factor of the Federal Tort Claims Act and an additional reason why Okinawa is a foreign territory.

Appellant relies on his statement, that in the absence of proof, the law is presumed to be that of California. We can not reconcile this statement with the *Spelar* case, nor does it seem reasonable that the burden would be upon the defendant to plead and prove the law where the accident occurred. It seems to us the plaintiff must prove his own cause of action, and in showing a violation of a law, he should plead and prove the law.

Appellant queries as to whether we can indulge in a commitment that we will terminate military government or occupation in Okinawa. Our answer is, can we indulge in any guessing, or if we can, can we not speculate contrary-wise? Appellant further states that the mission of our armed forces is to carry out the responsibilities of the United States. He does not state or prove what these are. However we do not think it is to supersede Congress in making laws

or annexing territory. The armed forces we think are merely a branch of the Government which enforces the mandates of Congress or the President.

Appellant states that the United States' rights to Okinawa had not been clearly defined. (Page 7.) Should this Court supersede Congress in so doing? He refers to the *Cross v. Harrison* case, where custom duties were enacted before a treaty of peace with Mexico was made. We think it is not in point and has nothing to do with laws and annexing territory, but merely with regulations. We think that the Army occupying a territory may make such regulations as are necessary for the safety or well-being of its command, even as to regulating prices, as long, among other things, as it does not conflict with the laws of the United States. It is also only a temporary matter.

Appellant also cites *Halleck International Law,* that a state may acquire a domain by conquest but it must be confirmed by treaty or tacit consent. Certainly there is no treaty as yet and there may be a tacit consent by Russia for the Army to occupy Okinawa pending the final determination, but we think it is farfetched to say that Stalin has agreed that Okinawa or Japan will be a part of the United States.

IS THERE SUFFICIENT PROOF UNDER THE FEDERAL TORT CLAIMS ACT TO HOLD THE UNITED STATES LIABLE?

This part of the points raised on appeal, as likewise the third point, may be considered by this Court

obiter dicta. However as the points have been raised, we will answer briefly.

The Federal Tort Claims Act states, under the heading "Jurisdiction",

> "Subject to the provisions of this title * * * the United States District Court * * * shall have exclusive jurisdiction * * * render judgment * * * on account of personal injury * * * caused by the neglect or wrongful act * * * of any employee of the Government *while acting in the scope of his office or employment* (italics ours) under circumstances where the United States, if a private person, would be liable to the claimant * * * in accordance with the law of the place where the act or omission occurred."

It will be noted that the law specifically makes the United States liable and gives the Court *jurisdiction* only while "acting in the scope of his employment". Therein it differs with the California law. In this case there is no common law involved. It is purely statutory. The plaintiff can sue only through the permission of the sovereign and only upon the exact terms it permits. The Act makes it mandatory on the appellant to *prove* someone was at the time of the impact acting within the scope of his employment. If appellant does not do so, the District Court has *no jurisdiction* to try the case. It is a jurisdiction requisite, a condition *sine qua non.* No presumption can be indulged in because (a) the sovereign requires proof, (b) "a presumption is a deduction which the law *expressly* directs to be made * * *". (See 1959

C.C.P. of Calif.) Presumptions are wholly creatures of law.

Davis v. Hearst, 160 C. 143, 116 P. 530.

Here the law expressly states and directs that the Court only has jurisdiction if the employee was in the scope of his employment and then applies the law of the place of the accident. Congress could have simply left out the scope of employment in the Act, if that was its intention.

The Legislature may provide certain things shall be presumptive or *prima facie* evidence.

People v. Fitzgerald, 14 C.A. (2d) 180, 58 P. (2d) 718.

But Congress did not so provide. On the contrary it made it mandatory that it be proven before the Court has jurisdiction. There are no presumptions even in the State of California, except those enumerated in the Code of Civil Procedure of California.

Setrakian v. I.A.C., 61 C.A. 582, 215 Pac. 504.

Nor can a presumption be based upon a presumption. A similar case of this on the facts and law is the case of

Victor Hubsch v. U. S., 174 F. (2d) 7.

We cannot distinguish that case from the present on the law involved. This case is so important that we do not desire to quote part thereof.

Another case is

U. S. v. Evelyn Campbell, 172 F. (2d) 500.

The facts in this case are not as clearly in point as in the *Hubsch* case but the basis for the decision is the

same. In this case a United States sailor, while running for a troop train, struck and injured a lady. The plaintiff contended the sailor was acting "in line of duty", which in the Tort Claims Act is the same as course and scope of employment. The Circuit Court in holding this was not so, stated,

> "The whole structure and content of the Federal Tort Claims Act makes it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of respondeat superior, in the same manner and to the same extent as the liability of private persons under that doctrine were measured and limited in the various states. The very heart and substance of the act is to be found in the words, 'scope of his office or employment', not as appellee would read them when wrenched out of their context, but as they are precisely limited in it."

Therefore it seems clear that the appellant must prove that the crane was left there by an employee of the United States. This he has apparently failed to do. The mere fact that there was "U.S.M.G. or U. S. Military Government" painted on the vehicle, as testified by appellant's witness, does not make it an act of negligence within the course and scope of the authority. Perhaps the vehicle may have been stolen, borrowed, rented, or one of many other reasons beyond the scope of the employment of a Government employee. It may have been rented by the contractor doing the work on Okinawa. We do not

know, and apparently neither does the appellant, yet the burden is on the appellant to prove this.

Another exemption under this Act is that of an employee acting within his discretion, and it may have come under this exemption.

In

King v. United States, 178 F. (2d) 320,

a United States aeroplane was taken by one of the Army personnel without the consent of the member's superior officer. It crashed into the plaintiff's home but recovery was denied on the ground that it was not within the course and scope of the employment of said member of the Army personnel.

In

U. S. v. Eleazer, 177 F. (2d) 914,

an officer was driving home on leave and collided with plaintiff's automobile. It was held he was acting for his own purpose.

As Judge Bone of this Circuit said:

> "The sovereign surrenders its immunity to suit *only* where the act in question is performed within the scope of employment."

CALIFORNIA GUEST LAW.

We do not think that the law of this case is the law of California, but if so, would not the appellant come within the so-called California Guest Law? That is, he was riding in an automobile of the United States as a guest without paying any consideration therefor,

and while so riding, was injured. In such a case, he can not recover unless he shows intoxication or willful misconduct of said driver. (Vehicle Code 1935, Sec. 403.) A general discussion on this law is stated in 2 *Cal. Jur. Prud. Supp.* page 567.

Dated, San Francisco, California,
February 7, 1951.

Respectfully submitted,

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